

SERVED: November 29, 2002

NTSB Order No. EA-5007

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of November, 2002

_____)	
APPLICATION OF)	
)	
)	
ROBERT COLLINGS and)	
GORDON SCHMIDT)	
)	
)	Dockets 294-EAJA-SE-15824
for an award of attorney fees)	and 295-EAJA-SE-15825
and expenses under the)	
Equal Access to Justice Act)	
)	
_____)	

OPINION AND ORDER

Applicants have appealed from the Equal Access to Justice Act (EAJA) initial decision and decision on reconsideration of Administrative Law Judge William R. Mullins, served on April 3, and April 30, 2002, respectively.¹ The law judge denied their application for fees and expenses because they failed timely to file the complete application required by our rules. We deny the

¹ The two decisions are attached.

appeal.² In reaching our decision, we do not decide the question of whether the Administrator was substantially justified, an issue also not decided by the law judge.³

EAJA, at Title 5 U.S.C. 504(b)(1)(A), provides:

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.) (Emphasis added.)

As the law judge noted, our implementing rules, at 49 C.F.R. 826.23, require that an EAJA application "be accompanied by full documentation of the fees and expenses ... for which an award is sought." The rule goes on to require a "separate itemized statement ... showing the hours spent, ... a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable... ."

² The Administrator replied to the appeal. We also grant the Administrator's motion to strike applicants' motion to file a reply to the Administrator's reply, and to strike applicants' concurrently filed reply to that reply. Good cause for applicants' filings has not been shown.

³ Although respondents' counsel argues that the law judge found the Administrator not substantially justified, that is not the case. All he found was that respondents were prevailing parties, the first prerequisite to an EAJA recovery.

That rule is entitled "Documentation of fees and expenses." The rule is clear, and contains no exceptions.⁴

Nevertheless, the instant application, seeking more than \$50,000, contained only one piece of this required information: the total amount allegedly due, thus precluding the necessary review of whether the application complied with law. Counsel claims that requiring the filing of the detailed data would violate the attorney-client privilege and compromise applicants' ability to defend themselves by making confidential information available to the Administrator prior to the end of litigation. Counsel also argues that there would be no harm in allowing amendment of the application,⁵ and that applicants' initial filing "substantially complied" with our application requirements. We disagree.

It is one thing to solicit some piece or pieces of additional support or explanation; it is another to permit an entire application to be filed late.⁶ As the law judge found, this application contained *none* of the fairly extensive

⁴ The Board's rules track the model rules adopted by the Administrative Conference of the United States when EAJA was enacted.

⁵ Applicants, despite their alleged confidentiality concerns, have since filed a more detailed accounting (which, for unexplained reasons, also contains what appear to be the client's noted billing criticisms).

⁶ We disagree with applicants' notion that the rule's authorization to the law judge to seek clarifying or supporting information supports the relief they seek here. That authorization comes at the end of a long discussion of the detailed information an application must contain and is clearly intended only to supplement a detailed record already made.

information needed to assess it under the statutory criteria and our implementing rules. The application would still not be complete if applicants' late-tendered evidence were to be allowed. We note on only a brief incomplete review of that material that counsel has still failed to address the issues raised at 49 C.F.R. 826.6(c), and failed to explain or justify expert witness fees. Id. at (b)(2). See Application of George Sandy, NTSB Order No. EA-3543 (1992) (discussing details needed to calculate maximum allowable consultant's award).

As the law judge pointed out, the minimal showing required by the rules may be phrased in a way that does not compromise confidentiality and still permit the verification required by law of the reasonableness of the claimed fees and expenses. We cannot comply with the statutory requirements to award only "reasonable" fees and expenses and to cap those fees to a certain hourly rate, if we do not rule on the reasonableness of the exact work performed and the time it took. Similarly-detailed applications are required in EAJA proceedings before the courts, where fees and expenses in connection with court (rather than administrative) proceedings are sought. Applicants have not provided, nor are we aware of, any court ruling that the details of such filings violate either due process or the attorney-client privilege.

Moreover, if there was anything in the more detailed billings counsel ultimately submitted that would compromise applicants' ability to contest our ruling or that would provide

the Administrator any useful information (*and applicants offer absolutely no example of a legitimate concern in this regard*), they had the opportunity to raise the matter with the Board prior to filing the application, rather than in their petition for reconsideration to the law judge. Alternatively, they could have accompanied the application with an explanatory filing indicating where summary descriptors replaced more detailed ones. In any case, applicants' counsel has not convinced us that this is a legitimate concern here. Clearly, there are simple ways to prepare bills that generally describe the nature of the work without jeopardizing sensitive information. We have been processing these applications for many years, and this has never been a problem or an issue. And, applicants' suggestion to the law judge that the material be provided to him but not to the Administrator -- depriving the agency obliged to safeguard the government funds with which applicants would be paid of due process -- does not merit discussion.

The law judge opined that this might appear a harsh result. We disagree. Our rules are clear and available. Other EAJA applications are of public record for review. Applicants' appeals are unconvincing. We recently noted, in Administrator v. Diaz, NTSB Order No. EA-4990 (2002), that our procedural rules are strictly applied. We see no special circumstance not to do so here.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicants' appeal is denied; and
2. The law judge's initial decision and decision on reconsideration are affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.